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PROCEEDINGS AND ORDERS DATE: 030685

CASE NBR 84-1-00559 CFX
SHORT TITLE Peralta Shipping Corp. DOCKETED: Oct 9 1984
VERSUS Smith & Johnson Corp.

Date	Proceedings and Orders
Oct 9 1984	Petition for writ of certiorari filed.
Nov 14 1984	DISTRIBUTED. November 30, 1984
Nov 29 1984	Response requested. (Due December 29, 1984 - NONE RECEIVED)
Jan 3 1985	Brief of respondent Smith & Johnson (Shipping) Corp. in opposition filed.
Jan 9 1985	REDISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Feb 25 1985	REDISTRIBUTED. March 1, 1985
Mar 4 1985	Petition DENIED. Dissenting opinion by Justice Blackmun with whom Justice Marshall joins. (Detached opinion.) Justice Brennan would grant certiorari. Justice Powell OUT.
	**********

84-559

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PERALTA SHIPPING CORPORATION,

Petitioner,

v.

SMITH & JOHNSON (SHIPPING) CORP.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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35 pp

(I)

QUESTIONS PRESENTED

1. Does the Constitutional grant of power to the federal judiciary over – "all Cases of admiralty and maritime jurisdiction" – include those contracts between vessel general agents and port husbanding sub-agents.

2. Whether the Second Circuit's invitation to this Court to overrule the decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), should be accepted so as to reconcile the existing conflict among the Circuit Courts of Appeals: to promote uniformity and predictability in the maritime industry, and; to reconcile modern developments in the law and practice of admiralty since that decision.

THE PARTIES

The parties before this Court are those set forth in the caption.*

*Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioner states that it is a corporate parent, and that other than Peralta Shipping Agency, Inc., Petitioner has no other first-generation subsidiaries or affiliates.

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No.

IN THE

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OCTOBER TERM, 1984

PERALTA SHIPPING CORPORATION,

Petitioner,

v.

SMITH & JOHNSON (SHIPPING) CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Peralta Shipping Corp., respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on July 11, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 739 F.2d 798 (2d Cir. 1984), and is annexed hereto as Appendix A. The District Court's opinion and order, which was not reported, is annexed hereto as Appendix B.

JURISDICTION

The opinion and order of the Court of Appeals was entered on July 11, 1984, and this petition for certiorari was filed within 90 days of that date.

The Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 1333 of the Judicial Code, 28 U.S.C. §1333 provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

Petitioner Peralta Shipping Corporation ("Peralta") was a general agent for Bangladesh Shipping Corporation ("Bangladesh"), an operator of ocean-going cargo vessels. As general agent, Peralta entered into an "Agency Agreement" with respondent Smith & Johnson (Shipping) Corp. ("S&J"), whereby S&J was obligated to provide necessary services to all Bangladesh vessels calling at United States Gulf ports between Brownsville, Texas and Tampa, Florida.

S&J's primary responsibilities under the "Agency Agreement" were as follows:

> S&J shall act as ships' husbanding agents for [Bangladesh's] vessels at the [Gulf] ports and shall perform the services normally incident thereto, including arranging for entrance and clearance of vessels at the Custom House, execution of all Custom House documents incidental thereto, arranging for fuel, water, provisions, emergency repairs, port charges and other similar matter, and for stevedoring, storage and other cargo handling; arranging for tugs; assisting in the procuring/repatriating necessary ship's personnel as requested by the Master; hospitalization of officers and other crew members; and shall issue bills of lading to shippers and passenger tickets to passengers as Agents as required; and shall use its best efforts in soliciting and securing cargoes in developing traffic and passengers for [Bangladesh] vessels.
>
> [S&J shall appoint sub-agents] in all ports where S&J does not have its own offices...
>
> [S&J will arrange for all services necessary for the prompt turnaround of vessels, including all matters of a ship husbanding nature, and will have qualified superintendents in attendance as necessary so as to at all times insure adequate supervision and the efficient working of the vessel, the cost of which is to be borne by S&J.

The "Agency Agreement" is set out at length in Appendix C, annexed hereto.

S&J's responsibilities under the "Agency Agreement" were summarized further by Robert Johnson, S&J's President:

> [T]o handle the vessels of the Bangladesh Shipping Corporation at those ports, to shift cargo, enter and clear the vessels, supervise the loading of the vessels and account for the disbursement and expenditures and to collect and remit freights.

739 F.2d *at* 799 (A-3).

On September 10, 1981, Peralta filed a complaint against S&J in the United States District Court for the Southern District of New York, pleading a maritime claim, and alleging that S&J had breached its obligations under the "Agency Agreement." Subsequently, the District Court granted Peralta's motion for summary judgment in the amount of $112,831.27. However, prior to the entry of final judgment, the District Court, *sua sponte* questioned its jurisdiction over the action. After the parties briefed the issue, the District Court concluded that the "Agency Agreement" under which S&J acted as port agent for Bangladesh vessels, was "outside of admiralty jurisdiction." (Appendix B annexed hereto at A 14).

The Court of Appeals, relying on this Court's decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), affirmed the District Court and found that the "Agency Agreement" was not a maritime contract within admiralty jurisdiction. Further, the Court of Appeals held that *Minturn* also encompassed "managing operator" agreements, so that even if the "Agency Agreement" at issue was within that class of contracts, it would still be outside admiralty jurisdiction, citing *Admiral Oriental Line v. United States*, 86 F.2d 201 (2d Cir. 1937).

Nevertheless, the Court of Appeals expressly noted that "these authorities have suffered some erosion in other circuits." 739 F.2d *at* 803 (A-9). The Court of Appeals also agreed that the "Agency Agreement" is of the type that is "intimately related with the shipping industry and would warrant inclusion within admiralty." *Id. at* 804 (A-11). Finally, the Court of Appeals stated that the "Supreme Court's overruling of *Minturn v. Maynard*," would be "welcome." *Id. at* 804.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Conflicts With the Decisions of Other Courts of Appeals Concerning the Scope of Admiralty Jurisdiction Over Agency and Sub-Agency Agreements

The Second Circuit, while noting the contrary authorities in other Circuits, held that a contract between a general agent and a port/husbanding sub-agent, was not a maritime contract within federal admiralty jurisdiction. Further, the Second Circuit held that, even if the contract provides that one of the parties is to act as a managing operator, it would still not be cognizable in admiralty. This Court should grant the writ of certiorari to resolve the conflict this decision creates with the rulings of the Fifth and Ninth Circuits.

A. The Decision of the Court of Appeals Conflicts With the Decision of the Ninth Circuit Court of Appeals in *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 351 F.Supp. 373 (N.D. Cal. 1972), affirmed, 498 F.2d 411 (9th Cir. 1974)

In *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 351 F.Supp. 373, (N.D. Cal. 1972), *aff'd* 498 F.2d. 411 (9th Cir. 1974), the Ninth Circuit expressly held that a husbanding agency contract almost identical to the "Agency Agreement" at issue in these proceedings, "was clearly maritime and the jurisdiction proper." 498 F.2d *at* 411.

In *Hinkins*, the agent performed the usual husbanding services for an ocean-going vessel including

> arranging for and supervising dockage, pilotage, tug assisting, line handlings, cargo discharge, discharging of deep tanks, sounding of fuel tanks, cleaning of holds, providing supplies, and handling operating details pertaining to the vessel's call in Baltimore, Maryland.

Hinkins Steamship Agency, Inc. v. Freighters, Inc., 498 F.2d *at* 412.

Further, the Ninth Circuit noted that the character of the work to be performed under the contract was determinative of the maritime nature of the contract, and that under such a test the agency agreement in *Hinkins* was "clearly maritime and necessary for the continuing voyage" of the serviced vessel. *Id.*

More importantly, the Court in *Hinkins* questioned this Court's decision in *Minturn v. Maynard*, *supra*, and the hairsplitting distinction of whether the agency agreement called for the performance of shore-side services which were only preliminary to actual maritime services. Rather, the Ninth Circuit deemed it sufficient that the husbanding agent exercised supervisory duties and that such services were necessary to and promoted the operations of the vessel. Indeed, the Ninth Circuit stated that "[u]nder more modern decisions" those authorities maintaining the distinction between preliminary and direct maritime services "are of doubtful validity" [citing *Archawski v. Hanioti*, 350 U.S. 532 (1956)].* 498 F.2d *at* 112.

B. The Decision of the Court of Appeals Conflicts With the Decision of the Fifth Circuit Court of Appeals in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961).

Also in conflict with the Second Circuit's decision is *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961), where, over twenty years ago, the Fifth Circuit upheld admiralty jurisdiction over a managing agent's contract. Moreover, the contract found to be maritime in *Hadjipateras* was not unlike that at issue in *Admiral Oriental Line v. United States*, *supra*, and this fact was expressly noted by the Second Circuit. (A-11).

In *Hadjipateras*, the agent was obligated to operate the vessel, obtain freight or freight engagements, collect the freight monies

*The District Court decision which the Ninth Circuit affirmed in upholding admiralty jurisdiction, found that the authorities relied on in support of the preliminary versus direct distinction "is at best questionable." *Hinkins Steamship Co. v. Freighters, Inc.*, 351 F.Supp. 373, 374, n.1 (N.D. Cal. 1972).

and, after deducting all operating expenses, remit the balance to the owners. Such a contract the Fifth Circuit held, was unmistakeably maritime and cognizable in admiralty:

> To begin with the contract is everything classically known as a maritime contract. It concerns a ship. It relates not only to a ship; its very purpose is to effectuate the physical, economic operation and employment of a vessel. And what is here in controversy is the fruits of such operation. The subject matter, in the sense of the *thing*, its purpose, and its result all center around the ship (citations omitted).

Hadjipateras v. Pacifica, S.A., 290 F.2d *at* 703. (emphasis in the original).

It is clear that the conflict between the Fifth and Ninth Circuits on the one hand and the Second Circuit on the other, is of particular importance to the maritime and shipping industry which has long depended on uniformity and predictability in ordering its myriad transactions and activities. Indeed, the Constitution's grant over "all civil Cases of Admiralty and maritime jurisdiction" to the federal judiciary was early given the broad construction necessary to promote the interests of maritime commerce. *United States v. Schooner Betsy & Charlotte*, 8 U.S. (4 Cranch.) 443 (1808) (Marshall, C.J.).

Failure to reconcile this manifest conflict among the Circuit Courts of Appeals is likely to result in a multiplicity of varying, and potentially conflicting, legal principles governing the obligations of agents and sub-agents throughout the United States. Thus, the port agent on the West Coast will have the benefit of the federal judiciary's expertise in matters maritime, while the agent on the East Coast will be relegated to state statutory and common law principles which may be strangers to the admiralty.

The contracts of vessel general agents and port and husbanding sub-agents, such as the one at issue, are clearly integral

elements in the maritime industry, without which vessels engaged in ocean carriage would be unable to call at distant ports. This Court's admonition in *Kossick v. United Fruit Co.*, 305 U.S. 731, 741 (1961) clearly applies with equal force to agency and sub-agency contracts: "We are hard put to perceive how this contract was 'particularly a matter of state and local concern'." [quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960)].

2. The Decision of this Court in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), Should be Overruled in Favor of Including Agency and Sub-Agency Agreements Within Admiralty Jurisdiction

In affirming the lower court's decision in this matter, the Second Circuit relied substantially on this Court's decision in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), wherein this Court held that an action for an accounting between a general agent and a vessel owner was not cognizable in admiralty. However, the Court of Appeals also noted the erosion of the general rule set forth in *Minturn*; the conflict among the other Courts of Appeals, and; the call of the treatise writers for this Court to finally bring agency contracts within the admiralty jurisdiction. ("[W]e are not free to anticipate the Supreme Court's overruling of *Minturn v. Maynard*, though we would welcome it.") 739 F.2d *at* 804 (A-12).

Indeed, the authorities which have relied on *Minturn* to exclude agency and sub-agency contracts have been described as "indefensible" by Professors Gilmore and Black, who have also predicted the eventual demise of the rule set out in *Minturn*:

> It is predicted that the Supreme Court, when the issue reaches it, will hold "general agency" and other vessel agreements within the jurisdiction — along with actions for accountings on them (citations omitted).

See Gilmore & Black, *The Law of Admiralty*, (2d ed. 1975) *at* 28, n.94b.

Professor Moore has also noted that agency contracts clearly satisfy the traditional tests set our by this Court in determining the maritime character of a contract. He has also noted that the exclusion of such contracts from the admiralty appears to be grounded on anomolous historical distinctions:

> That the contractual obligations of such brokers and agents are entered into and carried out on land and that the maritime tasks are not performed by the brokers themselves should, if *Insurance Co. v. Dunham* is still valid authority, be of no consequence. *Quite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts.*

7A *Moore's Federal Practice* 3003, 3005-06 (2d ed. 1982) (emphasis added).

Overruling *Minturn* in favor of a clear holding by this Court that agency and sub-agency contracts are cognizable in admiralty would promote the strong federal interest in uniformity and predictability so critical to the maritime industry. Moreover, *Minturn* should be re-evaluated in light of over a century of new developments since this Court decided that case, in both the practices of the maritime industry and the legal principles that govern it. The expanding role of foreign ocean carriers in the commerce of the United States has placed particular importance on the role of agents and sub-agents who render critical services to vessels throughout this country and without whose services the flow of international commerce would be drastically affected.

In addition, the enactment of the federal Maritime Lien Act in 1920, 46 U.S.C. §971, and its subsequent amendments, has generated a whole new body of law since *Minturn* was decided, defining what services rendered to a vessel will be deemed "necessaries" so as to give rise to a maritime lien and thus bring the matter within admiralty jurisdiction.

It is submitted that if *Minturn* were decided today, the inescapable conclusion would be that the services of the agent

in that case were necessary to and promoted the navigation and commerce of the vessel and are thus clearly maritime in nature.

Viewed in light of these developments, it is respectfully submitted that the *Minturn* decision is an anachronism that has little relevance in the modern shipping industry. The Second Circuit's ruling below and its reliance on *Minturn* should be reviewed as well as its invitation to this Court to re-evaluate *Minturn* so as to bring agency and sub-agency agreements within the admiralty jurisdiction.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 951—August Term, 1983
Argued: March 22, 1984 Decided: July 11, 1984
Docket No. 83–7922

PERALTA SHIPPING CORPORATION,
Plaintiff-Appellant,

v.

SMITH & JOHNSON (SHIPPING) CORP.,
Defendant-Appellee,

Before: LUMBARD, NEWMAN, and PRATT, *Circuit Judges*

Appeal from a judgment of the District Court for the Southern District of New York (Vincent L. Broderick, Judge) dismissing plaintiff's complaint for lack of subject matter jurisdiction.

Affirmed.

Michael G. Chalos, New York, N.Y. (Peter Skoufalos, Halley & Chalos, New York, N.Y., on the brief), for plaintiff-appellant.

Thomas D. Toy, New York, N.Y. (Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, New York, N.Y., on the brief), for defendant-appellee.

JON O. NEWMAN, *Circuit Judge:*

Navigating the jurisdictional channels of the federal courts' admiralty jurisdiction sometimes presents a choice between observance of ancient landmarks and heeding the siren call of the

commentators to venture out into unchartered waters. The choice is put to us squarely by this appeal in which we are asked to abandon the long-standing rule that suits upon general agency contracts are not within the jurisdiction of the silver oar. The request is made by plaintiff-appellant Peralta Shipping Corp. ("Peralta") in its appeal from a judgment of the District Court for the Southern District of New York (Vincent L. Broderick, Judge), dismissing for lack of subject matter jurisdiction Peralta's complaint against defendant-appellee Smith & Johnson (Shipping) Corp. ("S&J"). Though we find considerable merit in the arguments favoring classification of general agency and subagency agreements as "maritime contracts" cognizable in admity, we feel bound by controlling precedent of the Supreme Court and this Court to affirm the judgment of the District Court.

Facts

Peralta, a New York corporation, is the general agent in the United States, Mexico, and the Panama Canal Zone for the Bangladesh Shipping Corporation (also known as Bangladesh National Lines) ("Bangladesh"), an operator of several ocean-going cargo vessels. On July 5, 1979, Peralta and S&J, also a New York corporation, executed an agreement entitled "Agency Agreement," whereby Peralta appointed S&J as "Gulf agents" responsible for arranging services for all Bangladesh vessels calling at ports between Brownsville, Texas, and Tampa, Florida.

S&J's principal obligations under the "Agency Agreement" were as follows:

> S&J shall act as ships' husbanding agents for [Bangladesh's] vessels at the [Gulf] ports and shall perform the services normally incident thereto, including arranging for entrance and clearance of vessels at the Custom House, execution of all Custom House documents incidental thereto, arranging for fuel, water, provisions, emergency repairs, port charges and other

> similar matter, and for stevedoring storage and other cargo handling; arranging for tugs. . .; assisting in the procuring/repatriating necessary ship's personnel as requested by the Master, hospitalization of officers and other crew members; and shall issue bills of lading to shippers and passenger tickets to passengers as Agents as required; and shall use its best efforts in soliciting and securing cargoes in developing traffic and passengers for [Bangladesh's] vessels.
>
> [S&J shall appoint sub-agents] in all ports where S&J does not have its own offices. . . .
>
> S&J will arrange for all services necessary for the prompt turnaround of vessels, including all matters of a ship husbanding nature, and will have qualified superintendents in attendance as necessary so as to at all times insure adequate supervision and the efficient working of the vessel, the cost of which is to be borne by S&J.

At a deposition Robert Johnson, President of S&J, summarized S&J's responsibilities more broadly — "to handle [Bangledesh's] vessels at [the Gulf] ports, to shift cargo, enter and clear the vessels,[1] supervise the loading of the vessels and account for the disbursements and expenditures and to collect and remit freights."

Two years later, on September 10, 1981, Peralta commenced the present action. Although not specifically grounding jurisdiction on 28 U.S.C. § 1333 (1982), which grants the district courts jurisdiction over suits in admiralty, Peralta alleged the maritime nature of its suit: "This is an admiralty and maritime claim within the meaning of F.R. Civ. P. 9(h)." Peralta claimed that S&J had breadhed the "Agency Agreement" and sought an accounting and recovery of monies wrongfully retained by S&J — (i) freight collected on Bangladesh vessels in S&J's agency, and (ii) monies

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[1] Although the record is somewhat unclear, it appears that S&J "hired" itself to act as stevedore for Bangladesh ships at the port of New Orleans. This fact may explain the difference between S&J's contractual obligations and Johnson's broader description of the duties performed by S&J.

advanced by Peralta to pay Bangladesh's vessels' suppliers and vendors but improperly diverted by S&J. In its answer S&J contested admiralty jurisdiction, but the issue was not presented for a ruling by a motion to dismiss.

Peralta subsequently moved for summary judgment, alleging as undisputed S&J's debt in the amount of $112,831.27. S&J did not challenge the amount of the sum claimed, but maintained that it was entitled to summary judgment on the ground that its sister corporation, Smith & Johnson (Gulf), Inc., a bankrupt Louisiana corporation, had assumed, with Peralta's consent, sole responsibility for S&J's obligations under the Agency Agreement.

Judge Broderick initially granted Peralta's motion for summary judgment and found S&J liable in the amount of $112,831.27. The District Judge rejected S&J's contention that it had been relieved of its contractual obligations. Prior to the entry of final judgment, however, the District Court, on its own motion, questioned its jurisdiction over this action. After the parties briefed the issue, Judge Broderick concluded that the sub-agency contract under which S&J acted as local port agent for Bangladesh's vessels was not a maritime contract whithin the Court's admiralty jurisdiction. He relied upon our opinion in *CTI-Container Leasing Corp. v. Oceanic Operators Corp.*, 687 F.2d 377, 380 n.4 (2d Cir. 1982), and Judge Weinfeld's opinion in *P.D. Marchessini & Co. v. Pacific Marine Corp.*, 227 F. Supp. 17 (S.D.N.Y. 1964). Since S&J did not advance any other basis for federal jurisdiction, Judge Broderick dismissed the complaint pursuant to Fed. R. Civ. P. 12(h)(3). This appeal followed.

In support of the District Court's decision, S&J invokes the authority of venerable precedents establishing the general rule that general agency contracts are not cognizable in admiralty. Peralta invites us to distinguish the cited authorities on the ground that S&J's contractual obligations went beyond those of a general agency agreement or, in the alternative, to expand the jurisdictional boundaries to incorporate general agency contracts such as the one at issue.

Discussion

As the Supreme Court has recognized, "[t]he boundaries of admiralty jurisdiction over contracts — as opposed to torts or crimes — being conceptual rather than spatial, have always been difficult to draw." *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961). Neither the Constitution nor applicable statutes lay down criteria for drawing the boundary between maritime and non-maritime jurisdiction. The framers of the Constitution did not undertake to mark the limits of admiralty jurisdiction; Article 3, Section 2 of the Constitution simply extends the judicial power of the United States "to all Cases of admiralty and maritime jurisdiction." And although Congress has expressly included certain transactions or events within admiralty,[2] it has not sought to outline a general demarcation between maritime and non-maritime concerns.[3]

In the absence of express guidance, courts and commentators have struggled to determine how to vindicate the purpose underlying the grant of jurisdiction—protecting the national interest in uniform judicial supervision of the concerns of maritime shipping. With respect to maritime contracts, courts and commentators' competing jurisdictional "definitions" share a common focus — the relationship between the subject matter of the contract and the concerns of the maritime industry. Under Justice Story's formulation admiralty jurisdiction "extends over

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[2] *See, e.g.*, Ship Mortgage Act, 46 U.S.C. § 911 *et seq.* (mortgages); Federal Maritime Lien Act, 46 U.S.C. §§ 971–975 (creating maritime lien for services or supplies furnished to a vessel); Death on High Seas Act, 46 U.S.C. § 761 *et seq.* (death outside territorial waters); *see generally Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 44–46 (1934) (upholding constitutionality of Ship Mortgage Act) (detailing history of Congressional action with respect to admiralty jurisdiction).

[3] Most prominently, the Judiciary Act of 1789 conferred admiralty jurisdiction on the district courts in most general terms:

> Sec. 9. And be it further enacted, that the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the rights of a common law remedy, where the common law is competent to give it. . . .

1 Stat. 76 (1789), Rev. Stat. § 711 (1875). The "savings clause" was amended in 1948 to state "saving to suitors . . . any other remedy." 28 U.S.C. § 1333.

all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to the navigation, business or commerce of the sea." *De Lovio v. Boit*, 7 F. Cas. 425, 444 (C.C.D. Mass. 1815) (No. 3,776). In *North Pacific S.S. Co. v. Hall Brothers Marine Ry. & S. Co.*, 249 U.S. 119, 125 (1918), the Supreme Court described the inquiry as follows: "in matters of contract it depends upon the subject-matter, the nature and character of the contract . . . the true criterion being the nature of the contract, as to whether it have reference to maritime service or maritime transactions." *Kossick v. United Fruit Co.*, *supra*, 365 U.S. at 736, adopted Benedict's approach: " 'The only question is whether the transaction related to ships and vessels, masters and mariners as agents of commerce . . .' " (quoting 1 E. Benedict, *The Law of Admiralty* 131 (6th ed. 1940)) Other commentators define a maritime contract as one "for the furnishing of services, suppliers or facilities to vessels . . . in maritime commerce or navigation," 7A J. Moore, *Moore's Federal Practice* ¶.230[3] (2d ed. 1983), or "principally connected with martime transportation," Gilmore & Black, *The Law of Admiralty* 31 (2d ed. 1975)

These broad guiding principles have proven difficult to apply. While the resulting conception of maritime jurisdiction "has been one of fairly complete coverage of the primary operational and service concerns of the shipping industry," some "anomalous exceptions" abound. *See* Gilmore & Black, *The Law of Admiralty*, *supra*, at 22. The lack of a clear line is not surprising. Obviously, not all contracts with any maritime connection warrant invocation of admiralty jurisdiction. Application of the broad verbal formulations cited above requires some limiting recognition "that the actual concerns of the shipping industry may reach as far as the last ranch that sends cattle to port, and, even without stretching the matter at all, maritime transactions are inseparably connected with and shade into the non-maritime," Gilmore & Black, *The Law of Admiralty*, *supra*, at 29.

The need for consistency and predictability in this area of law suggests that special deference be accorded to prior rulings. "Precedent and usage are helpful insofar as they exclude or

include certain common types of contract," *Kossick v. United Fruit Co.*, *supra*, 365 U.S. at 735; "[i]n general we seek guidance from rulings in like or analogous situations in order to arrive at a reasoned decision in the circumstances at hand," *CTI-Container Leasing Corp. v. Oceanic Operations Co.*, *supra*, 682 F.2d at 380, "[t]o the modern student . . . the high-level concepts that have been suggested as keys to the definition, may be of interest, but he ought also to be aware that certain fields, without arguing the matter, may now be taken as settled within the jurisdiction, and others as equally certainly excluded from it." Gilmore & Black, *The Law of Admiralty*, *supra*, at 22.

A demarcation of ancient vintage, consistently recognized from the earliest days, is that agreements preliminary to a maritime contract are not cognizable in admiralty. An early defense of this rule has been of enduring influence.

> The distinction between preliminary services leading to a maritime contract and such contracts themselves have been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow, — the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.

The Thames, 10 F. 848 (S.D.N.Y. 1881).

Under this rationale neither an agreement to procure insurance, *F.S. Royster Guano Co. v. W.E. Hedger Co.*, 48 F.2d 86 (2d Cir.), *cert. denied*, 283 U.S. 858 (1931); *Marquardt v. French*, 53 F. 603 (S.D.N.Y. 1893), or crews, *Goumas v. K. Karras & Son*, 51 F. Supp. 145 (S.D.N.Y. 1943), *aff'd*, 140 F.2d 157 (2d Cir.), *cert. denied*, 322 U.S. 734 (1944), nor an undertaking to act as broker in securing cargo, *The Harvey and*

Henry, 86 F. 656, 657 (2d Cir. 1898), or a charter party, *Christman v. Maristella Compania Naviera*, 349 F. Supp. 845, 848 (S.D.N.Y.), *aff'd*, 468 F.2d 620 (2d Cir. 1972); *Aktieselskabet Fido v. The Lloyd Braziliero*, 283 F.2d 62 (2d Cir.), *cert. denied*, 260 U.S. 737 (1922); *The Thames*, *supra*, have been cognizable in admiralty.

Nor has admiralty jurisdiction extended to general agency contracts that call for "husbanding" a vessel, *i.e.*, arranging for performance of a variety of services preliminary to maritime contracts, such as soliciting cargo or passengers and procuring supplies, crews, stevedores, and tugboats. The Supreme Court so held in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), where the Court affirmed the dismissal, for want of jurisdiction, of an action by a general agent or broker against its principal, the owners of a steamship. "There is nothing in the nature of a maritime contract in the case. . . . The case is too plain for argument." *Id.*

This Court has faithfully adhered to the *Minturn* holding. Most prominent among our earlier cases are *Cory Brothers & Co. v. United States*, 51 F.2d 1010, 1011–12 (2d Cir. 1931) (Swan, J.), and *Admiral Oriental Line v. United States*, 86 F.2d 201 (2d Cir. 1936) (Hand, J.), *modified in other respects sub nom. Admiral Oriental Line v. Atlantic Gulf & Oriental S S Co.*, 88 F.2d 26 (2d Cir. 1937). *Cory Brothers* involved an agreement to act as the vessel's local agent at Pernambuco, Brazil. Under the terms of the contract, the agent was required "not only to attend to the discharge of cargo at that port but also to book cargo for ports beyond." *Id.* at 1011. When the agent sued to recover expenses incurred in defending the steamship from an action for cargo damage brought by a shipper, the District Court dismissed the libel for want of admiralty jurisdiction. Although this Court sustained jurisdiction derived from the Tucker Act, it noted in dicta that "[i]t is difficult, if not impossible, to distinguish *Minturn v. Maynard* from the case at bar, and that decision would seem to be a controlling authority against admiralty jurisdiction of the present suit." *Id.* at 1012.

Admiral Oriental Line involved two agency agreements — (i) an operating contract, under which the United States, owner of

the vessel, appointed Atlantic Gulf " 'its Agent to Manage, operate and conduct the business of such vessel . . . in accordance with the instructions' " of the United States and to " 'man, equip, victual and supply' " the vessel, with compensation based on a percentage of gross receipts, and (ii) a sub-agency agreement under which Atlantic Gulf appointed Admiral Oriental Line " 'General Freight Agents' " for its vessels in the Far East (the line assuming the obligation to appoint sub-agents at ports where it had no offices of its own) — and two lawsuits. 86 F.2d at 203. After successfully defending a shipper's suit against the vessel, the Line sued Atlantic Gulf to recover the litigation expenses. Atlantic Gulf in turn sued the United States for both any damages it might have to pay its sub-agent and its costs in defending against the Line's action. The Court found neither action "cognizable in admiralty; they are on all fours with *Minturn v. Maynard*, 17 How. 477, 15 L. Ed. 235, a case which the Supreme Court has never either overruled or even modified." *Admiral Oriental Line v. United States*, *supra*, 86 F.2d at 203. On reconsideration the Court explicitly stated that it would apply *Minturn's* holding to "managing operator" agreements: *Minturn* "still seems to us flat on point. The report is indeed very short, but it states that the libelant was a general ship's agent and broker, and we can see no material distinction between such an agent and a managing operator; if the case is to be overruled, only the Supreme Court should do it." *Admiral Oriental Line v. Atlantic Gulf & Oriental S.S. Co.*, *supra*, 88 F.2d at 27.

Although these authorities have suffered some erosion in other circuits,[4] neither the Supreme Court[5] nor the courts of

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[4] In *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 700, 703–04 (5th Cir. 1961), Judge Brown upheld jurisdiction over a vessel management contract not unlike that at issue in *Admiral Oriental Line*, *supra*. The Court concluded that the contract to operate the vessel, obtain freight and collect freight monies "is everything classically known as a maritime contract. It concerns a ship . . . its very purpose is to effectuate the physical, economic operation and employment of a vessel." *Hadjipateras v. Pacifica, S.A.*, *supra*, 290 F.2d at 703.

In *Hinkins Steamship Agency v. Freighters, Inc.*, 351 F. Supp. 373 (N.D. Cal. 1972), *aff'd*, 498 F.2d 411 (9th Cir. 1974), the Ninth Circuit upheld jurisdiction over a husbanding agreement. The Court questioned the continuing validity of *Minturn v. Maynard*, *supra*, and related precedent, and distinguised these authorities on the grounds that (i) the contract in *Hinkins*

this Circuit have departed from their teachings. *See, eg., P.D. Marchessini & Co. v. Pacific Marine Corp., supra,* 227 F. Supp. at 19 (performance of husbanding "within the preliminary or nonmaritime category under the authorities"). As the commentators recognize, *Minturn's* demarcation remains the general, well-settled rule—general agency contracts are not cognizable in admiralty. *See* 7A J. Moore, *Moore's Federal Practice* ¶.250, p.3001 n.1 (2d ed. 1983) (majority rule that agency contracts not maritime contracts) (collecting cases); Gilmore & Black, *supra,* at 28; 1 E. Benedict, *The Law of Admiralty* 131 (6th ed. 1940).

Appellant invites us to distinguish these venerable authorities primarily on the ground that S&J's contractual obligations went beyond those of a traditional general agent and included supervising the performance of maritime contracts procured by it.

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did not involve a continuing relationship between agent and principal but rather a voyage-specific contract. (ii) Hinkins' personnel did not merely procure but also supervised maritime services, and (iii) Hinkins' services were "necessary for the continuing voyage." *Id.* at 412. The latter distinctions are discussed in the text, *infra;* the first is properly criticized in Note, *Admiralty Jurisdiction Extends to Agent Who Actually Performs Essential Services for Vessel,* 4 J. Mar. L. Comm. 480, 490 (1973).

The distinction between "preliminary" and maritime contracts has also become somewhat blurred. *See, e.g., Stanley T. Scott & Co. v. Makah Development Corp.,* 496 F.2d 525, 526 (9th Cir.), *cert. denied,* 419 U.S. 837 (1974) (contract to procure insurance within admiralty since it "arises out of a maritime contract"); *Bergen Shipping Co. v. Japan Marine Services, Ltd.,* 386 F. Supp. 430 (S.D.N.Y. 1974) (contract to procure crew cognizable in admiralty); *Interocean Steamship Corp. v. Amelco Engineers Co.,* 341 F. Supp. 995 (N.D. Cal. 1971) (contract to procure stevedoring services within admiralty since it "arises out of maritime contract)."

[5] Nothing in *Archawski v. Hanioti,* 350 U.S. 532 (1956), is inconsistent with *Minturn v. Maynard, supra. Archawski* held that an action on a maritime contract is not within admiralty even though the suit is in the nature of *indebitatus assumpsit.* The Court rejected the view that jurisdiction turns on the nature of relief sought rather than on the subject matter of the action. "[S]o long as the claim arises out of a maritime contract, the admiralty court has jurisdiction over it." *Id.* at 535. We disagree with those courts that have read the quoted sentence to mean that "preliminary" contracts are within admiralty jurisdiction on the theory that they arise out of a maritime relationship. *See Stanley T. Scott & Co. v. Makah Development Corp., supra,* 496 F.2d at 526; *Interocean Steamship Corp. v. Amelco Engineers Co., supra,* 341 F. Supp. at 997. Such a broad reading of *Archawski* would place virtually all "preliminary" contracts within admiralty. *See Stanley T. Scott & Co. v. Makah Development Corp, supra,* 496 F.2d at 526 (Wallace, J., dissenting).

We decline the invitation. We acknowledge that *Hinkins Steamship Agency v. Freighters, Inc.,* 351 F. Supp. 373 (N.D. Cal. 1972), *aff'd,* 498 F.2d 411 (9th Cir. 1974), arguably carved such an exception to the general rule. In *Hinkins* the Ninth Circuit held that where a husbanding agent procures and supervises a variety of maritime services "necessary for the continuing voyage," the contractual arrangement is cognizable in admiralty. But we doubt the virtue of subdividing the category of general agency contracts based on the degree of importance of the services rendered by the agent or on the extent of supervision of performance. In the first place, almost every general agency agreement can be said to involve "necessary" services or some degree of supervision. To predicate jurisdiction on such hair-splitting distinctions would blur, if not obliterate, a rather clear admiralty demarcation. Moreover, as long as *Admiral Oriental Line* remains the law of our Circuit, the distinction espoused in *Hinkins* is unavailable here. In *Admiral Oriental Line,* this Court found no "material distinction," 88 F.2d at 27, between a "managing operator" contract, which required Atlantic Gulf "to manage, operate and conduct the business of such vessel as" the owner may assign and to "man, equip, victual and supply" the vessels, 86 F.2d at 203, and a contract for a ship's general agent. If Atlantic Gulf's "necessary" and "supervisory" services did not warrant admiralty jurisdiction, we would be hard-pressed to conclude that S&J's services do.

We find greater appeal in Peralta's suggestion that the entire class of general agency and sub-agency agreements should be brought into admiralty. We agree with the commentators that the jurisdictional boundaries should reflect the concerns underlying the grant of jurisdiction — the federal interest in promoting and protecting the maritime industry — and that "all those cases involving the enforcement, policing or adjustment of business arrangements as a practical matter primarily concerned with sea, lake and river transport," Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 Colum. L. Rev. 259, 274-77 (1950), should be within the admiralty. A general agency relationship is intimately related with the shipping industry and would warrant inclusion within admiralty. *See* Gilmore & Black.

The Law of Admiralty, supra, at 28 n.94b, criticizing *P.D. Marchessini & Co., supra*, as "of dubious defensibility. It is predicted that the Supreme Court, when the issue reaches it. will hold 'general agency' and other vessel-management agreements within the jurisdiction — along with actions for accountings on them."); 7A J. Moore, *Moore's Federal Practice* ¶.250 p. 3006 (2d ed. 1983) ("Quite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce, and consequently, should be cognizable within the admiralty jurisdiction of the district court.")

The prediction of Professors Gilmore and Black may be correct. However, we are not free to anticipate the Supreme Court's overruling of *Minturn v. Maynard*, though we would welcome it. Over forty years ago we indicated that if the rule precluding general agency contracts from admiralty is "to be overruled, only the Supreme Court should do it," *Admiral Oriental Line v. Atlantic Gulf & Oriental S.S. Co., supra*, 88 F.2d at 27. We continue to adhere to that position. The absence of subject matter jurisdiction required dismissal of the complaint.[6]

Affirmed.

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[6] The District Judge ruled, the appellate briefs assume, and we are obliged to agree that lack of subject matter jurisdiction in the District Court requires us to affirm the judgment dismissing the complaint, even though the District Court has fairly determined, after expenditure of a considerable amount of judicial resources, that the defendant is indebted to the plaintiff in the amount of $112,821.27. Rivaling the precepts of admiralty in ancient lineage is the principle that a judgment entered by a court lacking subject matter jurisdiction may not stand. Indeed, that rule commands virtual unanimity of support. Lack of subject matter jurisdiction has become the jurisprudential equivalent of the plague, requiring instant extirpation whenever noticed, even years after adjudication, *e.g., American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951); *Mansfield C. & L. M. Ry. v. Swan*, 111 U.S. 379 (1884); *Cuff v. Gleason*, 515 F.2d 127 (2d Cir. 1975); *Bishop v. N.L.R.B.*, 502 F.2d 1024 (5th Cir. 1974), to safeguard the purity of judicial processes from this most dreaded form of contamination.

This writer, speaking only for himself, wonders whether such unquestioning condemnation of judgments entered by courts without subject matter jurisdiction is always warranted. Of course a court that arrogates power to itself without even a colorable claim of authority to adjudicate a dispute cannot be permitted to decree any enforceable rights. And I can readily agree that all the technical rules of subject matter jurisdiction should be strictly enforced when lack of such jurisdiction is called to the attention of a court at the initial stages of litigation. But when the parties, with actual or constructive knowledge of jurisdictional defects, have been content to let a case proceed through determination of the merits of the dispute and no substantial claim can be made that the court's technical lack of subject matter jurisdication implicates its competency to adjudicate the dispute or that the forum with acknowledged jurisdiction possesses superior experience or other attributes commending deference to its authority, I see no catastrophe in letting the judgment stand. *See* American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* § 1386 (1969) (advocating modest reform).

The "fundamental" nature of jurisdiction ought to oblige courts to examine its assertion and timely challenge, but it need not require the automatic waste of judicial resources without even inquiry as to the social costs of retrial in the proper forum. It seems anomalous to permit a criminal defendant to waive his fundamental rights to a jury, a lawyer, and even a trial, yet assert that a civil litigant cannot ever waive lack of subject matter jurisdiction, even when he was the party who invoked the court's jurisdiction, *see American Fire & Casualty Co. v. Finn, supra*, 341 U.S. at 17-18 (defendant invoking removal jurisdiction not estopped from protesting there was no right of removal); *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880, 882 (2d Cir. 1970), *cert. denied*, 400 U.S. 993 (1971) (federal jurisdiction may be challenged at any stage, even by party who invoked it).

Even if I felt at liberty to deem lack of subject matter jurisdiction waivable, affirmance would remain appropriate in this case, since the answer of S&J seasonably disputed the District Court's admiralty jurisdiction and thereby preserved its objection.

Affirmed.

Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.	*Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*
#83-7922	#83-7922
1 concur,	I concur in all of the opinion
J. Edward Lumbard	except footnote #6.
???	GCP
7/10/84	7/5/84

was amended in 1948 to state "saving to suitors . . . any other remedy." 28 U.S.C. § 1333.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 5614 (VLB)
ORDER

PERALTA SHIPPING CORPORATION,

Plaintiff,

-against-

SMITH & JOHNSON (SHIPPING) CORP.,

Defendant.

VINCENT L. BRODERICK, U.S.D.J.

Summary judgment was granted to plaintiff in the amount of $112,831.27 with interest.

Plaintiff asserted admiralty jurisdiction herein, which defendant did not seriously question. After summary judgment had been granted, plaintiff's application for the award of pre-judgment interest at a prime rate led me to raise questions as to the propriety of admiralty as a basis for jurisdiction, and both parties were invited to, and did, brief the matter.

This action involves a general agency agreement, which requires the agent to husband vessels and solicit cargoes; to collect freight and other receipts; and to submit regular accounts after each vessel sails, setting forth the terms of compensation. Such an agreement is outside of admiralty jurisdiction. *P.D. Marchessini Co.* v. *Pacific Marine Corp.*, 227 F.Supp. 17 (S.D.N.Y. 1964); *see CTI-Container Leasing Corporation* v. *Oceanic Operators Corp.*, 687 F.2d 377, 380 n.4 (2d Cir. 1982).

Absent some other basis for jurisdiction, such as diversity, this court lacks jurisdiction of the subject matter of the action.

There is no diversity: plaintiff is a New York corporation and both plaintiff and defendant have their principal place of business in New York. No other basis for jurisdiction occurs to me or has been suggested to me.

The action is dismissed. Fed.R.Civ.P. Rule 12(h) (3).

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
October , 1983

APPENDIX C

AGENCY AGREEMENT

Memorandum of Agreement made between Peralta Shipping Corporation as General Agent in the United States for Bangladesh National Line service hereinafter referred to as Principal and Smith and Johnson (Shipping) Incorporated hereinafter referred to as S&J.

Principal has appointed S&J as its United States Gulf Agents for all ports from Brownsville, Texas to Tampa, Florida and in all ports where S&J does not have its own offices, to have subagents appointed by S&J, said agents to act on behalf of Principal's vessels (which will hereinafter include any vessel owned, chartered, operated or managed by Principal) on the following terms and conditions.

S&J shall act as ships' husbanding agents for Principal's vessels at the above ports and shall perform the services normally incident thereto, including arranging for entrance and clearance of vessels at the Custom House, execution of all Custom House documents incidental thereto, arranging for fuel, water, provisions, emerge repairs, port charges and others similar matters, and for stevedoring, storage, an other cargo handling; arranging for tugs (always using contracted tugs when required), personnel for handling of lines and simple duties; assisting in procurring/repatriating necessary ship's personnel as requested by the Master; hospitalization of officers and other crew members; and shall issue bills of lading to shippers and passenger tickets to passengers as Agents as required and shall use its best efforts in soliciting and securing cargoes in developing traffic and passengers for Principal's vessels.

S&J will arrange for all services necessary for the prompt turnaround of vessels including all matters of a ship husbanding nature, and will have qualified superintendents in attendance as necessary so as to at all times insure adequate supervision and the efficient working of the vessel, the cost of which is to be borne

by S&J. The remuneration to S&J shall be in accordance with attached "Addendum #1".

Stevedoring and all expenses incurred in connection with works onboard and supplies and repairs furnished to Principal's vessels, as well as Custom House charges, pilotage, towage, harbor tugs on Principal's vessels and other port charges expended, and also advertising expenses, teletype, telegram and such wire messages incurred on Principal's business, shall be borne by Principal.

All charges for ship's account are to be net, any credits, of whatsoever nature, to be for ship's account.

Office stationery, such as Manifests, Bills of Lading, and other regular forms, shall be provided by Owner.

Cargo and passengers shall be booked by S&J always in accordance with tariff rates and/or passenger fares in force and Principal's instructions, and also subject to the provisions of Principal's Bill of Lading.

Freight Brokerage to be for account of the vessel Principal.

S&J shall book cargoes and passengers strictly subject to the space and accomodation allotted by Principal on each sailing. S&J to receive and submit cargo claim documents from importers and/or exporters or others to Principal's P&I Club for approval of settlement and/or disposition instructions. Actual settlement of all cargo claims shall be accomplished in accordance with the instructions of Principal and also taking into consideration the rules of the Underwriters.

S&J undertakes to observe and abide by all regulations imposed by the Agreement of Principals. S&J will represent, or provide representation for, the Principal before the Federal Maritime Commission of the United States, and will file tariffs as requested; however, all tariff expenses, legal fees in connection with the above shall be for the account of Principal. Traveling expenses of officers and employees of S&J in attending to such business of Principal shall be for the account of Principal.

S&J shall use diligence to collect alloutward freight prepaid, for cargo and passage money and all inward freight payable at

the ports against delivery, and in the event such collections cannot be effected in the normal course shall report same promptly to Principal and threreafter shall assist and cooperate in such further steps as will be taken by them. In case collection cannot be made in the usual manner S&J will so notify Principal and then cooperate in taking the necessary action, and even proceeding judicially to collect these debts, if Principal requires that such cooperation be extended them.

Account statements, dully supported by vouchers, shall be made out by S&J in the form instructed separately by Principal and forwarded to Peralta Shipping Corporation promptly after the departure of each vessel from the final loading/discharge port but no later than six weeks after departure of each vessel from a port.

This "Agency Agreement" may be modified or amended at any time by mutual consent the parties hereto.

It shall run indefinitely, but subject to cancellation by mutual consent or on written notice by either party on ninety (90) days notice.

It is the intent of the parties hereto that Principal will utilize the stevedoring services of contracting stevedoring companies, always providing stevedoring rates which are competitive.

In acting hereunder and performing the services herein specified, S&J shall at all times use its best efforts to protect the interests of the Principal and avoid loss or unnecessary expense.

IN WITNESS WHEREOF the parties have hereunto affixed their signatures this 5th day of July, 1977.

SMITH & JOHNSON (SHIPPING) INC.	PERALTA SHIPPING CORPORATION As General Agent for Bangladesh National Line
_____	_____
_____	_____
J. C. East Executive Vice President	Armando de Peralta President

ADDENDUM NO. 1 TO AGENCY AGREEMENT BETWEEN PERALTA SHIPPING CORPORATION AS GENERAL AGENT IN THE UNITED STATES FOR BANGLADESH SHIPPING CORPORATION AND SMITH AND JOHNSON (SHIPPING) INC., HEREINAFTER REFERRED TO AS S&J.

Agency Remuneration

For vessel calls at Houston and New Orleans and U. S. Gulf outports, husbanding fee of $350.00 per port call.

On cargoes booked by S&J, the following commissions will apply:

General	1.25%
Governmen	1.00%
Over 2500 tons (bagged)	.75%
Bulk	.625%

On the balance of the Manifest—commissions to S&J regardless of how booked

General	.75%
Government	.6%
Over 2500 tons (bagged)	.45%
Bulk	.00%

SMITH & JOHNSON (SHIPPING) INC.	PERALTA SHIPPING CORPORATION As General Agent for Bangladesh National Line
_____	_____
_____	_____
J. C. East Executive Vice President	Armando de Peralta President

No. 84-559 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PERALTA SHIPPING CORPORATION,

Petitioner,

—against—

SMITH & JOHNSON (SHIPPING) CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. EDWIN CAREY
Counsel of Record

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Smith & Johnson (Shipping) Corp., respectfully prays that the Court dismiss the petition for a Writ of Certiorari herein, for the following reasons:

1. **There is no conflict among the Circuits with respect to the matters at issue, since the cases relied upon by petitioner can readily be distinguished from the instant action.**

Petitioner contends that the opinion of the Second Circuit in this case is in conflict with the decisions of the Ninth Circuit in *Hinkins Steamship Agency, Inc.* v. *Freighters, Inc.*, 498 F. 2d 411 (1974) and of the Fifth Circuit in *Hadjipateras* v. *Pacifica, S.A.*, 290 F.2d 697 (1961). Each of these cases can be distinguished from the instant action. *Hadjipateras* was a suit by the owners of a vessel against her managing agent for breach of a contract under which "the managing agent was to *operate the vessel,* obtain freight or freight engagements, collect the freight monies and, *after deducting all operating expenses,* remit the balance to the owners." *Hadjipateras* v. *Pacifica S.A., supra* at p. 700 [emphasis supplied]. One cannot dispute that such a contract is readily distinguishable from one between the general agent and a sub-agent for a *steamship company,* such as the agreement at issue here, in which the sub-agent is to perform services for the company and the vessels that the company operates, rather than become involved in the operation of a specific vessel.

Similarly, *Hinkins* involved an agreement to husband a particular ship for one call at one port. In finding that the contractual agreement was maritime in nature, the Ninth Circuit Court of Appeals distinguished the case of *P.D. Marchessini & Co.* v. *Pacific Marine Corp.*, 227 F. Supp. 17 (S.D.N.Y., 1964), on the ground that it "involved [a] general continuing agency agreement held to be non-maritime in nature." *Hinkins Steamship Agency, Inc.* v. *Freighters, Inc., supra* at p. 412. *Marchessini*

was the case relied upon by the District Court in dismissing the complaint in the instant action (Petition, A-14).

2. There is no compelling necessity, either under the Constitution or for reasons of public policy, for this Court to overrule *Minturn* v. *Maynard*.

Petitioner takes the position that the decision in *Minturn* v. *Maynard*, 58 U.S. (17 How.) 477 (1854) is an "anachronism", irrelevant to the needs of the maritime industry in this day and age. It is respectfully submitted, however, that to overrule *Minturn* would be to burden the already overloaded dockets of the Federal Court system with a category of cases that would have absolutely no need for—or right to—the remedies available under the admiralty jurisdiction. An agent suing a sub-agent for breach of an agency agreement cannot seriously contend that it has an enforceable maritime lien against any vessel serviced by the sub-agent, and any rights under such an agreement surely will be as well-protected by the courts of any State as by the Federal courts, should the predicate for diversity jurisdiction not be present. There is nothing uniquely maritime in character about agency or sub-agency agreements, simply because they speak of services rendered to ships, 1 Benedict, *Admiralty*, pp. 11-7, 11-8, 11-34 (7th Ed., 1981).

This Court has historically granted certiorari to lower tribunals only to consider important, novel or recurring questions of law. Thus, in *Kossick* v. *United Fruit Co.*, 305 U.S. 731 (1961), the Court considered a suit by an injured seaman to enforce an oral agreement by a shipowner to assume responsibility for his improper or inadequate treatment at a Public Health Service hospital, in consideration of his foregoing private treatment. Under the applicable State law, the oral contract was unenforceable. The Court, noting that oral contracts were recognized in admiralty, held that the plaintiff's claim fell within the Federal maritime jurisdiction—the only jurisdiction in which relief was available to him. In contrast, the petitioner herein is in

no way barred from pursuing his remedies in the courts of New York State.

In *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), this Court stated, "We are not inclined at this juncture to disturb the existing precedents and to extend shoreward the reach of the maritime law further than Congress has approved." *Id.* at p. 211. While this opinion was concerned with a tort action, we believe that the principle stated is equally applicable to contractual disputes, such as the instant case, which do not give rise to critical questions of public policy, restraint of commerce or other constitutional considerations, and which do not constitute such novel or recurring issues so as to justify the overruling of a precedent that has endured for one hundred and thirty years. If the law is to be changed, then let Congress change it.

At a time when considerable thought is being given to limiting the diversity jurisdiction of the Federal Courts, or even eliminating it altogether, it would be counterproductive for this Court to diminish the anticipated benefit of such a limitation by unnecessarily broadening the admiralty jurisdiction of the same Courts.

Conclusion

Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully Submitted,

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(3)

SUPREME COURT OF THE UNITED STATES

PERALTA SHIPPING CORPORATION *v.* SMITH & JOHNSON (SHIPPING) CORP.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84–559. Decided March 4, 1985

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN would grant certiorari.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

The admiralty jurisdiction of the federal courts extends generally to a transaction that "'relates to ships and vessels, masters and mariners, as the agents of commerce.'" *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 736 (1961), quoting 1 E. Benedict, Admiralty 131. Notwithstanding the broad sweep of the admiralty jurisdiction, this Court, since the time of its single-page opinion in *Minturn* v. *Maynard*, 17 How. 477 (1854), has refused to extend admiralty jurisdiction to disputes involving general agency contracts that call for "husbanding" a vessel, that is, arranging for the performance of the various services that are preliminary to maritime movement. This case presents an opportunity to address the continued vitality of this much-criticized exception to admiralty jurisdiction, an exception that has been applied inconsistently and that has created unnecessary confusion in the federal courts.

Petitioner Peralta is the general agent in the United States for an operator of several ocean-going cargo vessels. In 1979, it executed a sub-agency agreement with respondent Smith & Johnson whereby it appointed respondent as "Gulf agents" responsible for arranging services for the principal's vessels calling on ports between Brownsville, Tex., and Tampa, Fla. Under the agreement, respondent promised

5 pp

to act as the "husbanding agen[t]" by providing for services such as

> "arranging for entrance and clearance of vessels at the Custom House, execution of all Custom House documents incidental thereto, arranging for fuel, water, provisions, emergency repairs, port charges and other similar matter, and for stevedoring, storage and other cargo handling; arranging for tugs,"

and a number of other services directly involved with the operation of vessels while at port preparing for departure. See *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 739 F. 2d 798, 799 (CA2 1984).

Two years after the agreement was signed, petitioner commenced this action in the United States District Court for the Southern District of New York. Relying on the court's admiralty jurisdiction, petitioner alleged that respondent had breached the agency agreement. It sought an accounting and recovery of money said to have been wrongfully retained by respondent. In particular, Peralta sought to recover freight collected on vessels and not turned over to it, and money advanced by petitioner to pay suppliers but diverted by respondent. Addressing cross-motions for summary judgment, the District Court on its own questioned its subject-matter jurisdiction. It concluded that the sub-agency "husbanding" contract under which respondent acted as local port agent for the principal was not a maritime contract within the court's admiralty jurisdiction. It therefore dismissed the complaint pursuant to Fed. Rule Civ. Proc. 12(h)(3).

The Court of Appeals affirmed, 739 F. 2d 798 (CA2 1984), holding that it was constrained by *Minturn*, *supra*, and those Second Circuit cases that had faithfully adhered to the rule established in *Minturn* that admiralty jurisdiction does not extend to general agency or sub-agency "husbanding" con-

tracts. 739 F. 2d, at 802–803. The court declined to narrow the scope of *Minturn* by finding an exception for husbanding sub-agency contracts that provide services necessary for the continuing voyage, rather than services preliminary to the voyage, though it recognized that the Ninth Circuit had taken this approach in *Hinkins Steamship Agency v. Freighters, Inc.*, 351 F. Supp. 373 (ND Cal. 1972), aff'd, 498 F. 2d 411 (1974). See 739 F. 2d, at 803–804. Finally, the court recognized that the *Minturn* rule made little sense in light of the policy concerns underlying the grant of admiralty jurisdiction—the federal interest in promoting and protecting the maritime industry. See 739 F. 2d, at 804. Though it "would welcome" a decision from this Court overruling *Minturn*, because agency and sub-agency agreements are clearly an integral part of maritime commerce, and thus should be included within the admiralty jurisdiction, it recognized that it was without authority to issue such a decision, and that "'only the Supreme Court should do it,'" quoting *Admiral Oriental Line* v. *Atlantic Gulf & Oriental S. S. Co.*, 88 F. 2d 26, 27 (CA2 1937). See 739 F. 2d, at 804.

"The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spacial, have always been difficult to draw." *Kossick* v. *United Fruit Co.*, 365 U. S., at 735. Generally, however, contract actions that relate to maritime service or maritime transactions have been understood to fall within the admiralty jurisdiction of the federal courts. Though the need for bright-line rules in this area is evident, the line drawn in *Minturn* has been criticized widely and severely because it excludes so much that obviously concerns maritime transactions. Thus G. Gilmore & C. Black, The Law of Admiralty 28, and n. 94b (2d ed. 1975), regard the rule as one of "dubious defensibility," and have predicted that, when this Court reaches the issue, it will hold that general agency and other vessel-management agreements fall within the admiralty ju-

risdiction, and will overrule *Minturn* and its progeny. See also 7A J. Moore & A. Pelaez, Moore's Federal Practice ¶.250, p. 3006 (2d ed. 1983) ("Quite clearly, such agreements are an integral part of, and in furtherance of, maritime commerce and, consequently, should be cognizable within the admiralty jurisdiction of the district courts").

Not only is the *Minturn* rule of dubious validity, but in efforts to narrow its application, the Courts of Appeals have developed a number of equally questionable exceptions to the rule that have created confusion and disagreement. Thus, for purposes of determining admiralty jurisdiction, the Ninth Circuit would distinguish among maritime agency contracts based on a series of factors, including the degree of importance of the services rendered by the agent, the extent of supervision of performance, and the existence of a continuing relationship between agent and principal. *Hinkins*, *supra*. The Fifth Circuit appears to have taken the position that *Minturn* applies only to an action for an accounting. See *Hadjipateras* v. *Pacifica, S. A.*, 290 F. 2d 697, 704, and n. 15 (1961).* The Second Circuit in the present case recognized that its decision was in conflict with these decisions of the Fifth and Ninth Circuits. See 739 F. 2d, at 803, and n. 4.

The conflict between the approaches to this question taken by the Courts of Appeals is reason enough to grant this petition, for uniformity and predictability in the maritime industry were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance. A substantial argument has been advanced that the rule established in *Minturn* improperly excludes from federal maritime juridiction disputes that directly concern the business of maritime commerce. In light of the strength of that argu-

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*"[T]he distinctions made by the courts in dealing with agreements with brokers and agents seem contrived and not based upon sound reason or policy." 7A J. Moore & A. Pelaez, Moore's Federal Practice, § .250, p. 3003 (2d ed. 1983).

ment, of the confusion and conflict in the courts, and of the need for a uniform rule, I would grant this petition.

I therefore dissent.

JUSTICE POWELL took no part in the consideration or decision of this petition.